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In the Supreme Court of the United States

OCTOBER TERM, 1985

TRUCK DRIVERS LOCAL 807, ETC., ET AL., PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably determined that, under Section 9(b)(3) of the National Labor Relations Act, the respondent company could not be compelled, upon expiration of its collective bargaining agreement, to continue to recognize and bargain with the union representing its guard employees when the union also admits non-guards to membership.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-23a) is reported at 755 F.2d 5. The decision and order of the National Labor Relations Board (Pet. App. 25a-46a), including the decision of the administrative law judge (Pet. App. 47a-76a), are reported at 270 N.L.R.B. 787.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1985. A petition for rehearing was denied on March 26, 1985 (Pet. App. 24a). The petition for a writ of certiorari was filed on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 77a-81a.

STATEMENT

1. Respondent Wells Fargo (the Company)[1] operates an armored car service that transports money, securities, and other valuables for banks and other commercial customers (Pet. App. 48a). In 1948, the Company entered into a collective bargaining relationship with Local 820, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America covering guards in the New York City area. The parties thereafter executed a series of collective bargaining agreements, the last of which was effective from March 1977 until March 1980 (*id.* at 49a).

In June 1979, Local 820, which had been composed exclusively of guards employed in the armored car industry, was merged into petitioner Teamsters Local 807, a larger local that admitted both guards and nonguard employees to membership (a "mixed guard" union). The Company voluntarily recognized Local 807 pursuant to a successorship clause in Local 820's bargaining agreement, and the parties' relations were governed by that agreement until its expiration. Pet. App. 49a. Following expiration of the agreement, and after the parties had failed to reach agreement on a new contract, the Company notified the union on June 2, 1980, that it was "withdrawing the voluntary recognition accorded Local 807 IBT as collective bargaining representative of [its] armored guard employees" (*id.* at 50a). The union and one of its members subsequently filed unfair labor practice charges with the National Labor Relations Board alleging that the Company violated Section

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[1]The Company intervened in the court of appeals and accordingly is a respondent in this Court.

8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition and refusing to bargain, and the Board's General Counsel issued a complaint.

2. The Board, rejecting the conclusion of the administrative law judge (ALJ), held that the Company did not violate Section 8(a)(5) and (1) by withdrawing recognition from petitioner, and accordingly it dismissed the complaint (Pet. App. 25a-46a). Because, under Section 9(b)(3) of the Act, 29 U.S.C. 159(b)(3), a "mixed guard" union is not entitled to certification by the Board and therefore the Company could not have been compelled to recognize it as an initial matter, the Board ruled that the Company did not commit an unfair labor practice by withdrawing its prior voluntary recognition.[2] The Board rejected the ALJ's reasoning that Section 9(b)(3) expressly precludes only Board certification of mixed guard unions, but does not otherwise abrogate an employer's general statutory obligation to continue to recognize and bargain with a union that it has voluntarily recognized. The Board explained (Pet. App. 32a (footnote omitted)):

> It is clear that * * * Congress' purpose in enacting Section 9(b)(3) was to shield employers of guards from the potential conflict of loyalties arising from the guard union's representation of nonguard employees or its

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[2]Section 9(b)(3) prohibits the Board from certifying a union to represent a unit of guard employees if the union also admits nonguards to membership, or is affiliated directly or indirectly with an organization that admits nonguards to membership. Local 820 was certified by the Board in 1948 because at that time the Board held that armored car personnel were not "guards" within the meaning of Section 9(b)(3). *Brink's, Inc.*, 77 N.L.R.B. 1182 (1948). In 1953, the Board reversed that ruling. *Armored Motor Service Co., Inc.*, 106 N.L.R.B. 1139. Thus, since 1953, both Local 820, a union of guards affiliated with the Teamsters, and Local 807, a Teamsters local that itself admits guard and nonguard members, have been "mixed guard" unions ineligible for Board certification under Section 9(b)(3).

> affiliation with other unions who represent nonguard employees. However, this potential conflict of loyalties exists whether a mixed guard union is certified or not. Viewed in this light, there is no basis for the Board's drawing a distinction between initial certification and, as here, the compulsory maintenance of a bargaining relationship through the use of a bargaining order. In either case, saddling the employer with an obligation to bargain presents it with the same set of difficulties and the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid.

The Board added that, as the "*intended beneficiary*" of the protection against divided employee loyalty in Section 9(b)(3), an employer does not waive that protection, including the right not to be forced to bargain, by agreeing to recognize a mixed guard union in the first instance (Pet. App. 35a-36a (emphasis in original)).[3] Board Member Zimmerman dissented, finding that the language of Section 9(b)(3), which prohibits only Board certification of mixed guard unions, does not otherwise abrogate an employer's obligation to bargain with a recognized union in the absence of an employer's good faith doubt concerning the union's continued majority support among employees (*id.* at 38a-46a).

3. The court of appeals upheld the Board's decision and enforced the Board's order (Pet. App. 1a-23a). The court

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[3]Because the Board found that Congress in Section 9(b)(3) had been concerned with shielding employers from *potential* conflicts of loyalty among guard employees, the Board considered irrelevant the ALJ's finding that the Company withdrew recognition in this case for economic reasons related to the negotiations for a new contract (Pet. App. 32a-33a n.10). The Board specifically noted, however, that it was not reaching the question whether an employer would be privileged to withdraw recognition from a mixed guard union during the term of a collective bargaining agreement (Pet. App. 27a n.4).

noted at the outset that "Congress precluded certification of [mixed guard] unions because it realized that employers should not be forced to bargain with [such] unions" due to the risk of divided loyalties among employees (Pet. App. 11a). In light of that congressional purpose, the court agreed with the Board that there is "no reasoned basis for a distinction between initial certification and compulsory maintenance of a voluntary relationship" (*ibid.*). Rather, the court found that the policy concerns underlying Section 9(b)(3) suggest that an employer should remain free to withdraw recognition from a mixed guard union after having previously extended it, although that would not be true in the case of a union either certified or eligible for Board certification, which an employer must continue to recognize as long as the union enjoys majority support (*id.* at 9a, 11a).[4] Accordingly, the court concluded, "based on the language and legislative history of Section 9(b)(3), the Board was warranted in interpreting the section as proscribing Board direction to an employer to bargain with a mixed guard union despite prior voluntary recognition of that union by the employer" (*id.* at 10a-11a).

Judge Mansfield dissented (Pet. App. 13a-23a). He explained that, in his view, Congress, by prohibiting only Board certification of mixed guard unions in Section 9(b)(3) and by failing expressly to make certification a prerequisite to employee representation by a mixed guard union or an employer's general statutory duty to bargain, did not intend to permit an employer that voluntarily has recognized a mixed guard union to withdraw recognition at the end of a contract term.

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[4]The court noted, however, that an employer who voluntarily recognizes a mixed guard union generally may not discontinue the relationship during the term of a collective bargaining agreement (Pet. App. 11a, citing *Burns International Detective Agency, Inc.*, 134 N.L.R.B. 451 (1961)).

ARGUMENT

Petitioners contend (Pet. 7-20) that the Act requires an employer who has voluntarily recognized a mixed guard union thereafter to continue recognition absent a good faith doubt or actual evidence of the union's continued majority support. This contention is without merit. The court of appeals correctly concluded that the Board's decision that the employer is free to withdraw recognition is a reasonable construction of Section 9(b)(3) that furthers the congressional policy against the conflict of employee loyalties that could arise from compelled representation by mixed guard unions. That construction by the Board is entitled to substantial deference. See *Pattern Makers' League, AFL-CIO* v. *NLRB,* No. 83-1894 (June 27, 1985), slip. op. 5; *NLRB* v. *City Disposal Systems, Inc.,* No. 82-960 (Mar. 21, 1984), slip op. 6. There is no conflict in the circuits on this issue, and accordingly no reason why this case warrants review by this Court.[5]

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[5]Contrary to petitioner's contention (Pet. 7-10), the issue raised in this case is not foreclosed from further decisions by the Board and subsequent review in the courts of appeals by the fact that the General Counsel will not issue further complaints alleging that an employer's withdrawal of voluntary recognition from a mixed guard union violates Section 8(a)(5) of the Act. A mixed guard union from which voluntary recognition is later withdrawn could picket in support of its asserted right to continued recognition, and urge its status as a voluntarily recognized union as a defense to a charge that the picketing violates Section 8(b)(7) of the Act, 29 U.S.C. 158(b)(7). That Section prohibits under certain circumstances picketing "where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization," but the Board has held that it does not apply to picketing by an incumbent union claiming a legitimate right to *continued* recognition. See *NLRB* v. *Local Construction Trades Council of Santa Barbara County (Sullivan Electric Co.),* 146 N.L.R.B. 1086, 1087 (1964). The fact that the Board's General Counsel would refuse to issue a complaint on the basis of the union's contentions under Section 8(a)(5) would not preclude the union's defense in the Section 8(b)(7) proceedings. See *Hotel & Restaurant Employees Local 274 (Warwick Caterers),* 269 N.L.R.B. 482, 482-483 (1984)).

1. In enacting Section 9(b)(3) as part of the 1947 Taft-Hartley amendments, Congress established a clear exception from the general statutory requirement expressed in Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), that an employer recognize and bargain with the union selected by a majority of employees in an appropriate bargaining unit. In Section 9(b)(3), Congress expressly provided that, notwithstanding the general duty to bargain in Section 8(a)(5) or the desires of employees, the Board is precluded from certifying a mixed union to represent a unit of guards.[6] The legislative history of Section 9(b)(3) makes clear that its purpose was to prevent the potential conflicts of loyalty that may arise when guards are required to enforce rules for the protection of an employer's property against fellow union members.[7] Congress ensured an employer's right to be free

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[6]Congress also provided, in a clause not at issue here, that the Board shall not allow bargaining units composed of both guards and non-guard employees. *§* 9(b)(3), 29 U.S.C. 159(b)(3).

[7]Congress enacted Section 9(b)(3) as a direct reaction to this Court's decisions in *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947), and *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947), in which the Court had reversed lower court decisions refusing to enforce Board orders compelling employers to bargain with plant guards represented by the same union that represented the employers' production and maintenance employees. In refusing to enforce the Board's order in *Jones & Laughlin*, the Sixth Circuit had explained (146 F.2d 718, 722-723 (1944)):

> When these particular [u]nions were selected as bargaining agents for the plant protection employees, these employees might in an effort to discharge their duty to their employer find themselves in conflict with other members of their [u]nion over the enforcement of some rule or regulation they were hired to enforce. * * * We think that the imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the free flow of commerce.

During consideration of the Conference Report containing the version of Section 9(b)(3) that was finally enacted, Senator Taft stated: "The conferees * * * have been impressed with the reasoning of the

of such conflicts by removing the Board's certification authority in cases of mixed guard unions, thereby also precluding the Board from ordering an employer to recognize such a union under Section 8(a)(5). The effect of the Section 9(b)(3) ban on certification therefore was to establish that an employer has *no* duty initially to recognize and bargain with a mixed guard union under Section 8(a)(5). Whether or not an employer wishes to deal with such a union is a matter of its free choice. See *NLRB* v. *White Superior Division, White Motor Corp.*, 404 F.2d 1100, 1103 (6th Cir. 1968).

Circuit Court of Appeals for the Sixth Circuit in the Jones and Laughlin case * * * that this was an abuse of the discretion permitted to the Board under the Act * * *." 93 Cong. Rec. 6444 (1947). Later in the debates, Senator Taft further explained that "as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees." 93 Cong. Rec. 6445 (1947).

As the Board noted in reviewing the legislative history in this case (Pet. App. 31a-32a n.9, 33a-34a), although this Court in *Jones & Laughlin* and *Atkins* had focused on the particular cases of plant guards who were also commissioned police officers or members of the military, and hence had an obligation not only to their employer but also to the community, it is clear that Congress was concerned with the problem of divided loyalties among guards generally in enacting Section 9(b)(3). See H.R. Conf. Rep. 510, 80th Cong., 1st Sess. 47-48 (1947); *Teamsters Local 71* v. *NLRB*, 553 F.2d 1368, 1373 (D.C. Cir. 1977). Thus, the Board, with judicial approval, has consistently applied Section 9(b)(3) to armored car security personnel for more than 30 years. See *Armored Motor Services Co., Inc.*, 106 N.L.R.B. 1139, 1140 (1953); *Teamsters Local 851* v. *NLRB*, 732 F.2d 43 (2d Cir. 1984); *Teamsters Local 71* v. *NLRB*, *supra*. Petitioner does not challenge this aspect of the Board's interpretation of Section 9(b)(3) for the purposes of this case (see Pet. 7 n.2).

Against this background, the Board reasonably concluded that Section 9(b)(3) also precludes it from compelling an employer that voluntarily has recognized a mixed guard union to continue recognition and bargaining when it no longer chooses to do so. In this situation, just as in the case of initial recognition, resort to the Board's processes under Section 8(a)(5) would violate the policy protecting employers from the potential conflicts inherent in mixed guard unions. In the words of the court of appeals (Pet. App. 11a), there is "no reasoned basis for a distinction between initial certification and compulsory maintenance of a voluntary relationship. A voluntary relationship cannot change the substance of Section 9(b)(3)." See also Pet. App. 28a. A contrary conclusion would mean that an employer forever waives its statutory protection if it once recognizes such a union voluntarily. Cf. *Pattern Makers' League, AFL-CIO* v. *NLRB, supra* (requiring employees to forfeit their Section 7 right to refrain from concerted activities as a condition of union membership violates the fundamental policies of the Act favoring employee free choice).

2. Petitioners' contention (Pet. 10-17) is that the language of the Act does not support the Board's construction because Section 9(b)(3) in terms precludes only certification of a mixed guard union, and Section 8(a)(5) does not expressly require certification as a prerequisite to the employer's duty to bargain, which attaches upon voluntary recognition based on majority status. Hence, an employer that voluntarily recognizes a mixed guard union is bound by Section 8(a)(5) to continue recognition absent a showing of loss of majority. This technical contention reflects an unduly literal and narrowly focused reading of the statute. This Court has set forth the principle that "[i]n expounding a statute, [the Board] must not be guided by a single sentence or member of a sentence, but look to the provisions of

the whole law, and to its object and policy." *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 285 (1956) (citation omitted). Applying this principle, the Board correctly concluded that petitioners' literal reading "would thwart [the] congressional purpose" (Pet. App. 34a).

Petitioners' reliance on the principle that, under Section 8(a)(5), an employer who voluntarily recognizes a majority union must continue that recognition absent a good faith doubt of majority status is misplaced. That principle is based on a presumption of continuing majority support coupled with an employer's obligation under Section 8(a)(5) to deal with a union on the basis of majority support *in the first instance.* See *Brooks* v. *NLRB,* 348 U.S. 96, 103-104 (1954). Here, however, by prohibiting certification in Section 9(b)(3), Congress decided that an employer has no such obligation with respect to a mixed guard union (see *NLRB* v. *White Superior Division, White Motor Corp., supra*). In light of this statutory policy protecting an employer's freedom not to recognize a mixed guard union, notwithstanding majority support of the employees, the Board reasonably concluded that Section 8(a)(5) does not compel an employer to continue recognition that it was always free to withhold any more than it compels recognition of a mixed guard union in the first instance.

Petitioners rely (Pet. 19-20) on decisions holding that an employer violates Section 8(a)(5) if it withdraws voluntary recognition from a unit including both professional and nonprofessional employees, even though certification of the unit was improper because the professionals were not afforded a chance to vote on their inclusion as required by Section 9(b)(1), 29 U.S.C 159(b)(1). See *International Telegraph & Telephone Corp.* v. *NLRB,* 382 F.2d 366, 370 (3d Cir. 1967), cert. denied, 389 U.S. 1039 (1968); *NLRB* v. *Cardox Div. of Chemetron Corp.,* 699 F.2d 148, 154-155 (3d Cir. 1983). These cases are inapposite. The professional

employees in those cases consented to their inclusion notwithstanding the lack of an election. It is those employees who were the intended beneficiaries of Section 9(b)(1), 29 U.S.C. 159(b)(1). The denial of *their* right to an election provides no basis for the employer to withdraw recognition of the union. Here, by contrast, the relevant statutory provision was intended to benefit the employer despite the wishes of a majority of the unit employees. The employer's right not to be compelled to recognize a mixed guard union is not eliminated by voluntary recognition. Cf. *Utah Power & Light Co.*, 258 N.L.R.B. 1059, 1061 n.14 (1981) (notwithstanding their voluntary inclusion in a unit with nonprofessionals for 43 years, professional employees were not precluded from asserting their right to an election under Section 9(b)(1)).

Petitioner's reliance (Pet. 14-16) on *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956), is also misplaced. In that case, the Court held that a state court could not enjoin a union's peaceful picketing for recognition, even though the union was statutorily precluded by former Section 9(f), (g), and (h), 29 U.S.C. (1958 ed.) 159(f), (g), and (h) (repealed in 1959), from invoking the Board's certification processes. The Court concluded that, despite the union's lack of access to the Board because of noncompliance with statutory provisions requiring the filing of certain affidavits concerning communist affiliation, "by virtue of the conceded majority designation of the union, the employer was obligated to recognize the designated union," and therefore the union was entitled to picket for recognition. 351 U.S. at 75. See also *NLRB* v. *District 50, United Mine Workers,* 355 U.S. 453, 461-462 (1958) (noncompliance with Sections 9(f), (g), and (h) does not deny employees' right to select non-complying union as bargaining representative). But the Court made clear that, even though the union could "take other lawful action" such as recognitional picketing, it could not "resort to the Labor

Board" to enforce its status. 351 U.S. at 75.[8] Thus, contrary to petitioners' contention (Pet. 15), nothing in *Arkansas Oak Flooring* suggests that petitioners can resort to the Board in a Section 8(a)(5) proceeding to seek to enforce an obligation to bargain where, as here, the union is ineligible for certification.

Moreover, here the issue involves more than the union's non-compliance, perhaps temporary, with a prerequisite to recourse to the Board's procedures. This case involves a congressional judgment that, whatever the employees' wishes, an employer may not be forced to tolerate the potential for conflict of interest arising from mixed guard union representation. Unlike the situation in *Arkansas Oak Flooring,* the entire thrust of the statute is that the employer here is *not* "obligated to recognize the designated union" (351 U.S. at 75).

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[8]Subsequent to the Court's decision in *Arkansas Oak Flooring,* Congress enacted Section 8(b)(7) to regulate recognitional picketing (see *NLRB* v. *Local 103, Iron Workers,* 434 U.S. 335 (1978)), and this Section has been interpreted to preclude such picketing by unions, including mixed guard unions, barred from certification under Section 9(b)(3). See *General Service Employees Local No. 73* v. *NLRB,* 578 F.2d 361, 370-372 (D.C. Cir. 1978); *Teamsters Local 851 (Purolator Courier Corp.),* 268 N.L.R.B. 452, 453 (1983), enforced, 732 F.2d 43 (2d Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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